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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 912

HENRY J. MILLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WARREN O. COLEMAN,
EDWARD R. SCHOWALTER,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioner, Henry J. Miller, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the aforesaid entitled cause on January 18, 1941, affirming the judgment of conviction of petitioner, in the United States District Court for the Eastern District of Louisiana.

Summary.

Petitioner was indicted and convicted of the crime of using the mails in furtherance of a scheme to defraud, in violation of Sec. 215 of the Criminal Code, Title 18, U. S. C. Sec. 338.

He was tried and convicted with four other defendants.[1] In the court below each defendant was represented by separate counsel, prosecuted separate appeals and filed separate briefs.

They are each making separate applications for writs of certiorari.

The basis of the prosecution was a certain contract entered into by the Board of Commissioners of the Orleans Levee District with Newman & Harris Co., a well known bond brokerage house of New Orleans, for the purpose of refunding the outstanding bond issues of the Board. Newman & Harris Co. was to be paid a percentage of the amounts saved the Board. The basis of the fraud claimed by the Government was that the computations of the amount due Newman & Harris was figured on an incorrect theory, and that Mr. Waguespack, who was a member of the Board participated in the profits of the refunding operation and concealed this fact from the other Board members which concealment and incorrect computation constituted bribery and a scheme and artifice to defraud (R. V. I., p. 110).

As to the computations the Court of Appeals stated that they might indicate fraud or mistake in a civil proceeding, but they would hesitate to rest a criminal conviction for the bribery of the board member. See (Op. p. 121—R. pp. 4821-2).

Reasons for Granting the Writ.

1. That the decision of the Court of Appeals is in conflict with applicable decisions of this Court, and decisions of other Circuit Courts of Appeal on the same matter, in that the court refused to charge the jury that advice of a reputable attorney honestly acted upon would constitute

[1] Abraham L. Shushan, Robert J. Newman, Norvin T. Harris, Jr., and Herbert W. Waguespack.

a defense in a case involving a specific intent, to-wit, intent to defraud, and on the question of good faith qualified the charge by instructing the jury, as follows:

> "On this question of good faith, you are instructed that it is no defense to a wrongful act knowingly and intentionally committed that the intent was innocent" (R. IV. 2756).

2. The Court of Appeals has decided an important question of general law, which extends the matters embraced within the terms of the mail fraud statute further than it has ever been extended during its existence of more than sixty-eight years, and in conflict with the weight of authority by holding that, "a scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official, would not only be a plan to commit the crime of bribery, but would be a scheme to defraud the public," without requiring the court to define the legal meaning of the term "bribery" in its instructions to the jury, or to give the special charges presented by petitioner explaining that a corrupt intent to influence the action of the public official was essential to the offense of bribery which was an essential element in this mail fraud indictment; and that if petitioner paid the attorney-board-member, believing it legal to do so, it was not bribery.

3. The Court of Appeals has decided an important question of Federal law, which has not been, but should be, settled by this Court, to-wit: Does the mail fraud statute embrace cases where money or property is obtained dishonestly by means of bribery, when no lies or false pretenses, promises or representations are made?

4. The proceedings in the District Court have so far departed from the accepted and usual course of judicial proceedings, and the lower courts have so far sanctioned such

a departure as to deprive the defendants of due process of law, and a fair and impartial trial, as to call for an exercise of this court's power of supervision by reason of the misconduct of the prosecuting attorney as was found by the Court of Appeals (see Op. pp. 115-116, reported decision, R. 4807-4809), wherein the Court of Appeals found the misconduct which amounted to an abuse, but failed to afford petitioner any relief.

5. The other four defendants, included in the indictment, are filing separate petitions for certiorari herewith,[2] and since the issues, in addition to the aforesaid, are precisely the same as in this case, in the interest of brevity, we respectfully refer the court to the petitions filed in said cases for the additional reasons for granting the writs here, which said reasons are adopted and made part hereof by reference, as fully as if copied herein in extenso.

Further reference is made to the record filed in said cases which record is precisely the same record used in the court below; petitioner files said record by reference thereto as it is voluminous and the available copies are in the possession of the other defendants and petitioner is without funds sufficient to have additional copies printed.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9388, *Abraham L. Shushan, et als.* v. *United States of America,* and that said judgment of the United States District Court for

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[2] *Abraham L. Shushan* v. *U. S.*, No. 910; *Robert J. Newman* v. *U. S.*, No. 911; *Norvin T. Harris* v. *U. S.*, No 911; *Herbert W Waguespack* v. *U. S.*, No. 913; all October 1940 Term.

the Eastern District of Louisiana, affirmed by the said Court of appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Petitioner further prays that he may file this petition by making reference to the record in the cases of the other defendants (see p. 3 n. 2) and without duplicating the printed copies of said record which are on file in this Court.

HENRY J. MILLER,
Petitioner,
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